

FILED
02-12-2019
CIRCUIT COURT
DANE COUNTY, WI
2019CV000084

EXHIBIT E

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN,
DISABILITY RIGHTS WISCONSIN, INC.,
BLACK LEADERS ORGANIZING FOR COMMUNITIES,
GUILLERMO ACEVES, MICHAEL J. CAIN, and
JOHN S. GREENE,

Case No. 19-CV-84

Plaintiffs,

Case Code 30701 & 30704

v.

DEAN KNUDSON, JODI JENSEN, JULIE M. GLANCEY,
BEVERLY GILL, ANN S. JACOBS, MARK L. THOMSEN,
MEAGAN WOLFE, and TONY EVERS,

Defendants.

**AFFIDAVIT OF KRISTIN M. KERSCHENSTEINER IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

STATE OF WISCONSIN

COUNTY OF DANE

I, Kristin M. Kerschensteiner, being duly sworn on oath, depose and state as follows:

1. I am the Director of Legal and Advocacy Services at Disability Rights Wisconsin, Inc. ("DRW"). I have personal knowledge and belief as to the matters set forth below.

2. DRW is a statewide, nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin. DRW maintains offices across the State of Wisconsin, including in Madison, Menasha, Milwaukee, and Rice Lake, with its principal office located at 131 West Wilson Street, Suite 700, Madison, Dane County, Wisconsin.

3. DRW's mission is to address the issues facing people with disabilities in the State of Wisconsin and to ensure their civil and human rights. DRW is regularly involved in policy and legal advocacy related to identified priority issues for people with disabilities, including concerns around community integration, inclusion, dignity, abuse and neglect, equal rights, and access to public health services and benefits.

4. DRW has a multi-member board of directors and mental health advisory council, including among their members persons with disabilities, who have significant input into DRW's goals and objectives.

5. DRW is a member of the National Disability Rights Network and is designated by the Governor of the State of Wisconsin to act as the congressionally mandated protection and advocacy system for Wisconsin citizens with mental illness, developmental disabilities, and other physical impairments, pursuant to Wis. Stat. § 51.62, 29 U.S.C. § 794e, 42 U.S.C. §§ 15041, *et. seq.*, and 42 U.S.C. §§ 10801, *et. seq.*

6. Pursuant to these laws, DRW has a state and federal mandate to protect and advocate for the rights of persons with disabilities in Wisconsin, including persons with developmental disabilities, mental illness, traumatic brain injury, and other persons with disabilities through the pursuit of administrative, legal, and other appropriate remedies.

7. As Wisconsin's protection and advocacy system, DRW oversees self-advocacy training, direct advocacy services, and other programs and services to assist persons with disabilities in accessing vocational rehabilitation training and employment services; securing or regaining gainful employment; asserting their right to choose to live in the least restrictive and most inclusive setting possible; securing election access, including registering to vote,

casting a vote, and accessing polling places; investigating allegations made by persons with disabilities who have been subject to abuse or neglect; and, as appropriate, pursuing legal remedies—including in this case—on behalf of DRW’s constituents.

8. The majority of the people with disabilities that DRW advocates on behalf of as the State’s protection and advocacy system are Wisconsin residents who are Medicaid-eligible or Medicaid recipients.

9. I believe that the December 2018 Extraordinary Session of the legislature was unconstitutionally convened and that all legislation and actions—including the adoption of 2017 Wisconsin Act 368 and 2017 Wisconsin Act 369 and the appointment of individuals to various boards, councils, and advisory committees—occurring during that session are illegal, unenforceable, and void.

10. DRW and its constituents are harmed by Section 10 of 2017 Wisconsin Act 370, which requires an express legislative mandate before the Wisconsin Department of Health services may “submit[] a request to a federal agency for a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules, or for authorization to implement a pilot program or demonstration project.” Legislative Fiscal Bureau, *December 2018 Extraordinary Session Bills as Passed by the Legislature* at 29-30 (Dec. 6, 2018), http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf. By curtailing the Wisconsin Department of Health Services’ authority to efficiently and effectively advance such waiver programs, Section 10 frustrates DRW’s ability to informally and effectively work in collaboration with the State executive agency that most directly affects the lives of people

with disabilities in Wisconsin, interferes with DRW's ability to fulfill its statutory mandate as Wisconsin's protection and advocacy system to pursue administrative remedies that protect the rights of people with disabilities, and forces DRW to divert resources from its proactive efforts to assist people with disabilities and instead expend more of its limited time and financial resources advocating for and advancing terms of Medicaid waiver programs in a manner beneficial to its constituency because the increased time and complexity associated with such efforts.

11. DRW and its constituents are also harmed by the codification, in 2017 Wisconsin Act 370, of a Medicaid waiver program approved by the federal Centers for Medicare and Medicaid Services on October 31, 2018, but not yet implemented. *See id.* at 38-39. Cementing the terms of a waiver in statute impedes DRW from pursuing and achieving informal, cost-effective administrative modifications benefiting persons with disabilities and frustrates DRW's efforts to fulfill its statutory mandate as Wisconsin's protection and advocacy system. In addition, DRW anticipates that the inflexibility created by codification of this waiver program will harm it and its constituents by requiring DRW to divert resources from its proactive efforts to assist people with disabilities, and instead force it to devote more of its limited time and financial resources to investigating and addressing unintended issues that harm people with disabilities that arise during the implementation and enforcement of the waiver.

12. DRW and its constituents are harmed by specific provisions in the newly codified Medicaid waiver that will have detrimental effects on people with disabilities. This includes drug screening and testing requirements, *see id.* at 33-36, the imposition of work

requirements, *see id.* at 38, and the creation of a new monthly premium for Medicaid-eligible individuals, *see id.* at 38-39, all of which impose new threshold requirements for Medicaid-eligible people with disabilities to access the Medicaid services to which they are entitled. Each of these requirements will disproportionately harm DRW's constituents and could lead to more people with disabilities being denied Medicaid coverage. For that reason, these provisions frustrate DRW's ability to achieve its mission, impair DRW's ability to fulfill its statutory mandate as Wisconsin's protection and advocacy system and will require DRW to divert its resources away from its proactive efforts to protect disabled persons' access to Medicaid services and opportunities for gainful employment and instead force it to devote more of its limited time and financial resources to assisting these individuals in accessing coverage and investigating claims brought by persons related to the increased difficulty obtaining coverage and the denial of access to Medicaid services.

13. DRW and its constituents are harmed by Section 13 of 2017 Wisconsin Act 370, which requires legislative approval before the Wisconsin Department of Health Services may seek federal approval for proposed amendments to Wisconsin's Medicaid program "if the estimated fiscal effect of the proposed plan amendment . . . is greater than \$7,500,000 from all revenue sources in the 12-month period following its implementation date." *Id.* at 32. The increased time and complexity associated with the adoption of State Medicaid plan amendments will harm DRW's constituents because many amendments may go unadopted or may not be adopted in a timely manner. The increased time and complexity associated with the adoption of State Medicaid plan amendments will also require DRW to divert its resources from its proactive efforts assisting people with disabilities and instead devote more of its

limited time and financial resources to advocating for statutory amendments to the State Medicaid plan in a manner advantageous to people with disabilities in Wisconsin.

14. DRW and its constituents will be harmed by Section 38 of 2017 Wisconsin Act 369, which imposes new limitations on agency guidance documents. As Wisconsin's protection and advocacy system, DRW has, over 40 years, identified legal issues that people with disabilities confront and has successfully worked with State agencies to develop appropriate administrative responses. Many of those responses have been memorialized in agency guidance documents, which ensure that, when the same issue arises for different individuals and/or in different areas of the State, the response is efficient, effective, and consistent. The anticipated rescission and amendment of guidance documents will impair DRW's ability to fulfil its federal mandate as the State's protection and advocacy system by making it more difficult for DRW to achieve efficient, effective, and consistent results for people with disabilities who face common challenges under Wisconsin law, and will instead require DRW to divert its resources towards ensuring that newly adopted, amended, or rescinded guidance documents do not harm people with disabilities' access Medicaid to and other services upon which they rely.

15. DRW routinely seeks to advocate for modifications to the State's Medicaid program through the Department of Health Services' issuance of informal guidance documents, State Medicaid plan amendments, or contract changes and uses these channels as the one of primary means by which it fulfills its protection and advocacy functions. It is likely that these methods will no longer be routinely available to DRW, or will be severely

constrained, and DRW's protection and advocacy functions will be impaired as a result of the implementation of 2017 Wisconsin Act 370.

16. DRW will likely be unable to seek timely or effective redress for programmatic or administrative issues that arise within the State Medicaid program because of the significant time and cost associated with the requirements included as part of 2017 Wisconsin Act 370 that require the Department of Health Services to seek legislative approval for each such change. It is likely that DHS' limited financial and staff resources will preclude its pursuit of legislative approval for every contract modification, policy change, or State Medicaid plan amendment that it and/or DRW seeks to make throughout the year and during waiver periods.

17. Upon information and belief, it is likely that uncertainty regarding the implementation of the provisions of 2017 Wisconsin Act 370 will pose a significant challenge to DHS in meeting the Family Care waiver renewal deadline of January 1, 2020.

18. The implementation of 2017 Wisconsin Act 370 will likely cause DRW to be impaired from seeking timely redress of systemic issues that routinely arise in the administration of State Medicaid program which will result in an increase in the number of denials for Medicaid services DRW's constituents face and will limit DRW's ability to resolve these issues for people with disabilities as a group and instead require it to litigate claims individually. As the protection and advocacy system for people with disabilities receiving Medicaid services in Wisconsin, DRW will likely be required to expend more of its limited staff time and financial resources participating in Medicaid hearings before State agencies and litigating these issues in court.

19. DRW and its constituents will be harmed as a result of Sections 35 and 80 of 2017 Wisconsin Act 369, which eliminate judicial deference to certain agency interpretations, decisions, and orders and will create uncertainty; discourage the consistent application of the laws they are charged with enforcing; encourage litigation; and result in increased costs to administrative agencies and the Department of Justice, which tasked with defending administrative actions through agency and judicial review. As a result, DRW will be forced to divert resources away from its protection and advocacy function in order to defend its constituents' claims in administrative and judicial review proceedings.

20. As a result of the enforcement of the provisions in 2017 Wisconsin Act 370, I believe it may possibly further delay the implementation of amendments to the State Medicaid Purchase Plan ("MAPP") program, which have been approved by the legislature. Delay of the MAPP amendments affect the ability of some of DRW's constituents to gain access to Medicaid coverage because changes to the medical needy monthly income limits have not yet been implemented.

21. Typically, when a new Medicaid waiver program is rolled out, unanticipated issues related to the implementation or administration of the program are identified and addressed through guidance documents, State Medicaid plan amendments, and contract amendments. It is likely that DRW will be unable to similarly work through DHS to address the issues that are likely to arise out of the codification of the new waiver program adopted as part of 2017 Wisconsin Act 370 and, as a result, that DRW's constituents will be harmed.

22. DRW and its constituents are harmed by Section 1K of 2017 Wisconsin Act 369, which "changes the time during which in-person absentee voting is permitted." *Id.* at 3.


Under Section 1K, “in-person absentee voting may occur from 14 days preceding the election to the Sunday preceding the election, but cannot occur on a legal holiday.” *Id.* These provisions limit the opportunities for electoral participation for people with disabilities, thereby impairing DRW in fulfilling its federal mandate of securing election access, including registering to vote, casting a vote, and accessing polling places for Wisconsinites with disabilities. These restrictions will also require DRW to divert its resources away from its proactive efforts to assist people with disabilities towards ensuring their constituents’ franchise rights.

23. Each of the above-described provisions of 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370 will harm not only DRW as an organization, but also the constituents DRW is mandated to protect as Wisconsin’s protection and advocacy system. These provisions are likely to disproportionately injure DRW’s constituents because the provisions will likely frustrate their access to Medicaid services; hamper their participation in the electoral process; and impair the efficient and effective development and adoption of new and innovative Medicaid waiver programs and State Medicaid plan amendments that would provide access to programs and services designed to enhance the lives of people with disabilities.

24. I am aware that DRW and the individuals it is federally mandated to protect and advocate on behalf of will suffer irreparable harm for the reasons stated above, including the implementation and enforcement of 2017 Wisconsin Act 368 and 2017 Wisconsin Act 369 that were adopted as part of an unlawfully convened legislative session.


Kristin M. Kerschensteiner

Subscribed and sworn to before me
this 9th day of January, 2019.


Notary Public, State of Wisconsin
My commission expires: permanent

